BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH W. EDWARDS	)	
Claimant	)	
VS.	)	
	)	Docket No. 220,839
D & M MASONRY	)	
Respondent	)	
AND	)	
	)	
TIG INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

Claimant appealed Administrative Law Judge Robert H. Foerschler's September 1, 1998, Award. The Appeals Board heard oral argument on April 20, 1999, by telephone conference.

APPEARANCES

Rian F. Ankerholz of Overland Park, Kansas, appeared for the claimant. Kevin J. Kruse of Overland Park, Kansas, appeared for the respondent and its insurance carrier, TIG Insurance Group.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is a claim for an October 29, 1996, work-related accident. The Administrative Law Judge found claimant entitled to a 45 percent work disability and then reduced the work disability by a 15 percent preexisting functional impairment resulting in a 30 percent permanent partial general disability award. The Administrative Law Judge also found claimant was entitled to 4.53 more weeks of temporary total disability benefits than were voluntarily paid by the respondent.

Claimant appealed and contends the Administrative Law Judge erred because the greater weight of the evidence proves he is entitled to a much higher work disability award. Additionally, claimant contends he is entitled to weekly temporary partial disability payments from January 6, 1997, through June 12, 1997. Also, claimant asserts that there is no persuasive evidence contained in the record that establishes a preexisting functional impairment to reduce the award.

In its brief, the respondent contends claimant is not entitled to a work disability award because claimant has retained, post-injury, the ability to earn 90 percent or more of his pre-injury average weekly wage. Or, if claimant is entitled to a work disability, the work disability computes to a lower percentage than the amount of his resulting permanent functional impairment. Respondent contends claimant has a 25 percent functional impairment and when reduced by a 15 preexisting impairment, entitles claimant to a permanent partial general disability award of 10 percent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Average Weekly Wage

The first issue claimant argues in support of a higher work disability award is claimant's pre-injury average weekly wage. The Administrative Law Judge found the wage statement admitted into evidence at the regular hearing only indicated claimant had an average of $5.94 per week of overtime pay. Since claimant was a full-time employee and was earning $16.55 per hour his regular pay without overtime would be figured at 40 hours per week or $662.[1] The Administrative Law Judge found claimant's average weekly wage was $667.94 by adding the $5.94 per week of overtime pay.

But the wage statement indicates that claimant earned a total of $570.98 of overtime pay in the 13 weeks before the October 29, 1996, accident. This is an average of $43.92 of overtime pay per week. Therefore, the Appeals Board finds that claimant's pre-injury average weekly wage is his regular weekly pay of $662 plus $43.92 of overtime pay for a total of $705.92 per week.

Is claimant entitled to a work disability and if so, what is the amount of the work disability?

[1] *See* K.S.A. 44-511(b)(4)(B)(i)(ii).

The Appeals Board concludes that the record as a whole supports a finding that claimant is entitled to a 41 percent work disability based on a work task loss of 43 percent averaged with a wage loss of 39 percent.[2] Additionally, the Appeals Board concludes the record fails to prove claimant's preexisting functional impairment. Thus, no reduction should be made in the work disability award[3].

On October 29, 1996, claimant injured his low back while performing the heavy job duties of a mason tender while working for respondent. Respondent provided claimant with medical treatment, first through John T. O'Mailey, M.D., and then with Mary Brothers, M.D., Terrance Pratt, M.D., and finally with orthopedic surgeon Robert J. Takacs, M.D.

Dr. O'Mailey treated claimant conservatively with medication and physical therapy. On November 21, 1996, the doctor had claimant undergo a Functional Capacity Evaluation (FCE). He released claimant to return to work with permanent restrictions identified in the FCE. Claimant returned to the respondent with those restrictions. Respondent then terminated claimant because it was unable to accommodate the permanent restrictions.

Before claimant started working for the respondent, he was employed as an automobile body repairman. When respondent failed to return him to work, claimant started an auto body repair shop in his garage. Claimant testified he started the business in December of 1996. Claimant was still operating the auto body repair shop when he last testified on June 26, 1998.

Claimant testified he only worked 24 to 32 hours in the body shop because he physically could not work more hours. In 1997, claimant also worked on a part-time basis for an asphalt paving company owned by his father-in-law and earned $1,300.

Before claimant's October 29, 1996, injury, he had been diagnosed with spondylolysis at L5 and with Grade I spondylolisthesis of L5 on S1. Claimant also, on two other occasions, had suffered low-back injuries while employed by the respondent. He injured his low back in December of 1993 and also in July of 1996. On both occasions, he was treated by John O'Mailey, M.D., and was taken off work for approximately 10 days in December of 1993 and four days in July of 1996. After each of those injuries, Dr. O'Mailey returned claimant to his regular duties without restrictions.

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[2]On the date of claimant's accident, October 29, 1996, work disability was determined by averaging the loss of claimant's work task performing ability with the difference between the wage claimant was earning at the time of the injury and the wage claimant was earning after the injury. *See* K.S.A. 1996 Supp. 44-510e(a).

[3]*See* K.S.A. 1996 Supp. 44-501(c)

Additionally, in 1992 claimant sustained a cervical injury while employed by the respondent. At that time, claimant underwent a cervical fusion preformed by orthopedic surgeon Robert J. Takacs, M.D. Claimant was off work for this injury for approximately a year and a half. Dr. Takacs returned claimant to his regular work duties without restrictions.

Dr. Robert Takacs also saw claimant in regard to the October 29, 1996, injury and testified by deposition in this case. Dr. Takacs felt the restrictions that were found in the November 21, 1996, FCE were appropriate permanent restrictions for claimant. Those restrictions were no lifting of more than 60 pounds; no pushing of more than 44 pounds; no pulling of more than 28 pounds; no pushing at shoulder level height of more than 37 pounds; no pulling at shoulder height of more than 22 pounds; no lifting and carrying of more than 75 pounds; and no stooping, kneeling, or crouching for more than 8 hours per day. Based on those permanent restrictions, Dr. Takacs opined that claimant could not return to the mason tender/ hod carrier job for respondent.

Dr. Takacs further opined that claimant "is permanently partially disabled due to his low back problems in the range of 25 percent body as a whole." The doctor was asked what percent, if any, was the 25 percent body as a whole permanent partial disability due to the claimant's preexisting condition and/or accidents that occurred before October 29, 1996. Dr. Takacs opined "certainly he did have a pre-existing condition, and that roughly 60 percent of his current disability is due to a pre-existing condition, 40 percent due to the new injury."

A list of job tasks that claimant performed in 15 years before the October 29, 1996, accident was shown to Dr. Takacs. There were 17 job tasks listed and Dr. Takacs opined that claimant could no longer perform 5 of those job tasks and if claimant had to drive a forklift or operate a lawn mower on rough surfaces he also could not do those two tasks. Dr. Takacs, therefore, concluded that claimant had lost 41 percent of his work task performing ability.

At claimant's attorney's request, the claimant was examined and evaluated on June 12, 1997, by P. Brent Koprivica, M.D. Dr. Koprivica found claimant's Grade I spondylolisthesis of L5 on S1 was permanently aggravated by claimant's October 29, 1996, work-related accident. In accordance with the AMA Guides for the Evaluation of Permanent Impairment, Fourth Edition, the doctor assigned claimant a 25 percent permanent functional impairment. Dr. Koprivica did not believe that claimant's preexisting low-back condition was a permanent impairment before the October 29, 1996, accident. Before October 29, 1996, claimant was able to perform very heavy physical labor without limitation. Claimant had experienced temporary symptoms in the past, but before a low-back condition can constitute a permanent impairment, claimant would have to had a history of permanent chronic symptomatology. Dr. Koprivica assigned all of the 25 percent permanent function impairment rating to the October 29, 1996, accident.

The doctor placed permanent restrictions on claimant activities of occasionally lifting and carrying of 50 pounds; avoiding frequent or constant bending at waist, pushing, pulling, or twisting; avoiding sustained or awkward postures; only occasional squatting, crawling, or kneeling; and only occasionally performing climbing type of activities.

From interviewing the claimant, the doctor complied a list of job tasks that claimant performed in the 15-year period preceding the October 29, 1996, accident. Based on the permanent restrictions imposed, Dr. Koprivica found claimant could not perform 5 of the 11 tasks for a 45 percent task loss.

The respondent argues claimant has demonstrated he retains the ability to perform auto body repair work. And, if claimant would apply for auto body repair jobs, he would be able to earn at least 90 percent of his pre-injury wage. Therefore, claimant's permanent partial disability benefits should be limited to his functional impairment rating.[4]

Claimant, on the other hand, contends that no one would hire him because he is physically unable to work a full eight-hour day. Therefore, claimant's actual wages that he has earned since his injury, including the earnings from the auto body repair shop, should be used to calculate the wage loss component of the work disability. This amounted to $190.56 per week, and when compared to claimant's pre-injury average weekly wage of $705.92, claimant has a 73 percent wage loss.

Additionally, claimant argues his work task loss should be based on a time-weighted list of work tasks which results in a 75 percent loss. Averaging the wage loss of 73 percent with the task loss of 75 percent results in claimant's entitlement to a work disability of 74 percent.

The Appeals Board concludes there is no opinion of a physician contained in the record that restricts claimant from working eight hours per day. The Appeals Board, therefore, finds since claimant is not restricted from working an eight-hour day, he has not made a good faith effort to find appropriate employment. Therefore, a post-injury weekly wage should be imputed to the claimant when determining claimant's work disability.[5]

Mike Dreiling, a vocational expect, testified concerning a list of claimant's job tasks and his ability to perform work in the open labor market. He found that claimant had the ability to perform automobile body repair in a small repair shop and earn $10.73 per hour. The Appeals Board concludes that a post-injury average weekly wage should be imputed to the claimant based on claimant's ability to earn $10.73 per hour for 40 hours per week

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[4]*See* K.S.A. 1996 Supp. 44-510e(a).

[5]*See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

for a $429.20 per week post-injury wage. When the imputed $429.20 weekly wage is compared to claimant's pre-injury average weekly wage of $705.92, the result is a 39 percent wage loss.

Mr. Dreiling also testified that he was unable to time-weight claimant's job task list because claimant could not give an accurate estimate of the time he spent on each task. Likewise, Mr. Dreiling testified that claimant was off work due to a neck injury for an unspecified period of time and this made it difficult to make an accurate time-weighted analysis. The Appeals Board concludes that the time-weighted analysis of the claimant's job task, as complied by claimant's attorney, is not accurate and should not be used to determine claimant's job task performing ability. Accordingly, the Appeals Board finds that Dr. Takacs' 41 percent job task loss opinion should be equally weighed with Dr. Koprivica's 45 percent job task loss opinion resulting in a 43 percent loss. As required by statue, when the 43 percent job task loss is averaged with the 39 percent wage loss the result is a 41 percent work disability award.[6]

The Appeals Board also concludes that the most persuasive medical opinion contained in the record concerning claimant's preexisting low-back condition is that of Dr. Koprivica. Dr. Koprivica acknowledged that claimant had a preexisting Grade 1 spondylolisthesis of L5 on S1. But he opined the condition was not a preexisting impairing condition since claimant only had temporary symptoms in the past and was asymptomatic at the time of the October 29, 1996, injury. Additionally, claimant was able to preform heavy physical demand activities without limitations before the October 29, 1996, accident.

The Appeals Board is mindful that respondent contends Dr. Takacs established through his testimony that claimant had a 15 percent preexisting functional impairment of the low back and that K.S.A. 1996 Supp. 44-501(c) requires a preexisting functional impairment be applied to reduce the award, if the injury is an aggravation of a preexisting condition. But the Appeals Board questions Dr. Takacs' opinion because his opinion concerning claimant's 25 percent functional impairment was not based on the AMA Guides, Fourth Edition as required by statue.[7] And his opinion on claimant's preexisting condition also was not based on the AMA Guides. Plus, the doctor speculated when he opined "roughly 60 percent of his current disability is due to a pre-existing condition, 40 percent due to the new injury." Accordingly, the Appeals Board finds the record failed to prove what, if any, of claimant's functional impairment was preexisting.

Is claimant entitled to additional temporary total disability and temporary partial disability payments?

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[6]*See* K.S.A. 1996 Supp. 44-510e(a).

[7]*See* K.S.A. 1996 Supp. 44-501(c)

Respondent voluntarily paid claimant 5.33 weeks of temporary total disability benefits from claimant's October 29, 1996, accident date through December 5, 1996. Claimant established through his testimony that Dr. O'Mailey released him to return to work after he completed the November 21, 1996, FCE. At that time, claimant took the FCE permanent restrictions to respondent, and respondent refused to accommodate those restrictions. Claimant then started his own business of repairing automobile bodies in his garage in December of 1996.

As claimant was not restricted from working eight hours per day, claimant could have worked full time. But he chose not to do so. The Appeals Board concludes claimant was not temporarily and totally or temporarily and partially disabled after he was released to return to work in late November of 1996 and after he started his own business in December of 1996. Therefore, claimant's request for additional temporary total disability and temporary partial disability benefits is denied.

The Appeals Board also adopts the Administrative Law Judge's findings and conclusions of law as its own that are not inconsistent with the findings and conclusions set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Robert H. Foerschler's September 1, 1998, Award, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kenneth Edwards, and against the respondent, D & M Masonry, and its insurance carrier, TIG Insurance Group, for an accidental injury which occurred October 29, 1996, and based upon an average weekly wage of $705.92.

Claimant is entitled to 5.33 weeks of temporary total disability compensation at the rate of $338 per week or $1,801.54, followed by 170.15 weeks of permanent partial disability compensation at the rate of $338 per week or $57,510.70 for a 41% permanent partial general disability, making a total award of $59,312.24.

As of July 30, 1999, there is due and owing claimant 5.33 weeks of temporary total disability compensation at the rate of $338 per week or $1,801.54, followed by 138.10 weeks of permanent partial compensation at the rate of $338 per week in the sum of $46,677.80 for a total of $ 48,479.34, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $10,832.90 is to be paid for 32.05 weeks at the rate of $338 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all remaining orders as set forth in the Award that are not inconsistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Rian F. Ankerholz, Overland Park, KS
Kevin J. Kruse, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director